Ultrasystems Western Constructors, Inc. *and* International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO. Cases 31–CA–17516, 31–CA–17571, 31–CA–17906 (formerly 20–CA–22467), and 31–CA–17907 (formerly 20–CA–22468)

April 18, 1995

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On February 26, 1993, the National Labor Relations Board issued its Decision and Order in the above-captioned case.[1] The Board found, inter alia, that the Respondent violated Section 8(a)(3) by maintaining a hiring policy which screened job applicants to uncover suspected union sympathizers, and by refusing to consider 66 applicants for employment based on the conclusion that they were union sympathizers. The Board ordered the Respondent to make whole all 66 applicants by reason of the Respondent's discriminatory refusal to consider them for employment and to offer them employment in substantially equivalent positions if the positions at the Rocklin and Bakersfield, California jobsites for which they applied were no longer available.

On March 3, 1994, the United States Court of Appeals for the Fourth Circuit issued an order enforcing the Board's Order in part, denying enforcement in part, and remanding the case to the Board.[2] Although the court agreed with the Board that the Respondent had unlawfully refused to consider for hire 65 applicants (excluding Creeden), it remanded the case to the Board with the direction ''to tailor more closely its order to match the discrimination found.'' Id. at 253. Citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984), for the proposition ''that the constraints of the statutory language require that 'a proposed remedy be tailored to the unfair labor practice it is intended to redress,''' the court found that the Board went beyond the scope permitted by Section 10(c) when it ordered the Respondent to make whole and reinstate all 65 applicants. Id. at 258. The court reasoned, in effect, that because the conduct found unlawful was a refusal to consider for hire, not a refusal to hire, the Board could not order the Respondent to make whole all 65 discriminatees absent a showing that the Respondent had positions available for them. Thus, for example, if at the compliance stage of the proceeding it turned out that only 10 vacancies existed, the court reasoned that it would go beyond ''neutralizing'' the discrimination in regard to hire to order the reinstatement of all 65 applicants. The court added that the Board could neutralize the discrimination in screening by ordering consideration of the 65 applicants in some preferred manner on later jobs and ''perhaps it also could order reinstatement with backpay *for those found*, in a compliance proceeding, *to have been denied actual positions*.'' Id. at 259 (emphasis in original). The court remanded the case to the Board to fashion a remedy of its own choosing.

On May 16, 1994, the Board advised the parties that they might file statements of position concerning the issues raised by the court's decision. The Respondent and the Charging Party filed statements of positions.[3]

The Board has accepted the court's remand. In fashioning a remedy, we are mindful of the court's direction to fashion an order that is ''congruent with the scope of discrimination, so that its enforcement neutralizes the discrimination, and does not go beyond.'' Id. at 259. Consequently, to remedy the Respondent's unlawful refusal to consider the 65 applicants for hire, we shall order it to consider them for hire and to provide backpay to those whom it would have hired but for its unlawful conduct. See, e.g., *KRI Constructors*, 290 NLRB 802 (1988). Backpay, however, shall not be limited to Rocklin and Bakersfield. For, as explained in our original decision in this case, the Board has rejected any ''precompliance presumption against reinstatement in the construction industry.''[4] Thus, if at the compliance stage of this proceeding it is determined that the Respondent would have hired any of the 65 applicants it unlawfully refused to consider, the inquiry as to the amount of backpay due these individuals will include any amounts they would have received on other jobs to which the Respondent would later have assigned them. Finally, if at the compliance stage it is established that the Respondent would have assigned any of these discriminatees to current jobs, we shall order the Respondent to hire those individuals and place them in positions substantially equivalent to those for which they applied at Rocklin and Bakersfield. Such a remedy does no more than place the discriminatees in the position they would have been in absent the Respondent's unlawful conduct.

In its statement of position, the Respondent contends, inter alia, that the ''only conceivable remedy that would neutralize the affect [sic]'' of the ''refusal-to-consider'' violation would be to order the Respondent to consider the discriminatees for future positions on a nondiscriminatory basis. The Respondent asserts that to go beyond this remedy would place the

[1] 310 NLRB 545.

[2] 18 F.3d 251. On review, the court reversed the Board's finding that full-time union organizer William Creeden was a bona fide applicant for employment and denied enforcement to that part of the Board's Order that pertains to Creeden.

[3] Unfortunately, the General Counsel chose not to file a statement of position on this important issue.

[4] 310 NLRB at 546, quoting *Dean General Contractors*, 285 NLRB 573, 574 (1987).

discriminatees in a position ''far better'' than they would have enjoyed absent the Respondent's refusal to consider. The Respondent also contends that the court found that the General Counsel did not prove that jobs were available and that applicants were qualified to fill those positions. Asserting that such issues are to be resolved at the liability phase of the proceeding rather than at the compliance stage, the Respondent contends that the General Counsel failed ''to prove these required elements of a violation'' at the hearing and cannot now relitigate these issues in another proceeding ''under the guise of compliance.'' We find these arguments without merit.

As to the Respondent's contention that future consideration on a nondiscriminatory basis is the only appropriate remedy for a refusal-to-consider violation, the court itself explained that:

> a refusal to consider begets a remedy that the employer must consider, *and when the refusal to consider also results in an actual refusal to hire, the refusal begets the remedy that the employer must hire those applicants who otherwise would have been hired*. [18 F.3d at 259. Emphasis added.]

Thus, if it is shown at the compliance stage of this proceeding that the Respondent would have hired any of these applicants but for its unlawful refusal to consider their applications, requiring the Respondent to make those applicants whole for its unlawful refusal to hire them does no more than restore the parties to the positions they would be in absent the unlawful discrimination.[5]

As to the Respondent's contention that the General Counsel failed to prove that jobs were available at Rocklin and Bakersfield, the court specifically found that ''it [was] uncontroverted that the applications in question were submitted to fill existing openings for employment at both the Rocklin and Bakersfield locations. *Thus, any discrimination in refusing to consider them could be found to constitute discrimination in regard to hire*.'' Id. at 256 (emphasis added). Accordingly, we find this contention without merit. Finally, as the court observed, the Board may prove discrimination in regard to hire by showing:

> (1) that the employer is covered by the Act; (2) that the employer at the time of the purportedly illegal conduct was hiring or had concrete plans to hire employees; (3) that anti-union animus contributed to the decision not to consider, interview, or hire an applicant; and (4) *that the applicant was a bona fide applicant*. [Id. at 256. Emphasis added.]

In sustaining the Board's finding of this violation, the court found, in effect, that the Board had established these elements of a prima facie case. Contrary to the Respondent's assertion, the court stated that to escape *all* liability, it was the *Respondent's* burden to show that none of the applicants were qualified for the available positions. In this regard, the court observed that under the applicable *Wright Line* analysis:[6]

> If the employer could have extricated itself from all liability by showing that *none* of the 66 applicants would have been hired, even without the impermissible motive, it could have done so, and the record indicates it attempted to do so. To this end, Ultrasystems attempted to show that the applications were stale or that some of the applicants were not qualified or not interested. Even with that evidence, there was still contrary evidence from which a rational factfinder could properly have concluded that Ultrasystems' refusal to consider applications or delaying their consideration was due, at least in part, to their union affiliation.
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> Because Ultrasystems was given the opportunity to show that none of the applicants would have been hired even in the absence of such improper motivation, and because the ALJ and the Board reasonably rejected this argument based upon evidence in the record, we believe that the Board acted within its power in finding a violation here. [18 F.3d at 257–258. Emphasis in original.]

In sum, because the court has sustained the Board's finding of this 8(a)(3) violation, we reject the Respondent's attempt to relitigate the issue of its liability here and shall order it to take the action set forth above which ''neutralizes the discrimination, and does not go beyond.''[7] Id. at 259.

[5] Indeed, as noted above, the court indicated that ''perhaps [the Board] also could order reinstatement with backpay *for those found*, in a compliance proceeding, *to have been denied actual positions*.'' Id. at 259 (emphasis in original).

[6] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[7] As explained above, in order to remedy the effect of the Respondent's unlawful conduct, we shall order it to consider the 65 applicants for hire and to provide backpay to those whom it would have hired but for its unlawful conduct. Backpay will not be limited to the Rocklin and Bakersfield jobs, but will include any amounts these discriminatees would have received on other jobs to which the Respondent would later have assigned them. Finally, if the Respondent would have assigned any of these discriminatees to current jobs, it will be directed to hire those individuals and place them in positions substantially equivalent to those for which they applied at Rocklin and Bakersfield. Should any individual be entitled to backpay, it shall be calculated in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board reaffirms its Order in the underlying proceeding, 310 NLRB 545 (1993), as modified, and orders that the Respondent, Ultrasystems Western Constructors, Inc., Rocklin and Bakersfield, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

''Make whole those employee-applicants at Rocklin and Bakersfield for any losses they may have suffered by reason of the Respondent's discriminatory refusal to consider them for hire in the manner described above in this Supplemental Decision and Order. Offer those employee-applicants at Rocklin and Bakersfield who would currently be employed but for the Respondent's saunlawful refusal to consider them for hire employment in the positions for which they applied or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against by the Respondent.''

2. Substitute the attached notice for that set forth in our underlying decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
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> To form, join, or assist any union
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> To bargain collectively through representatives of their own choice
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> To act together for other mutual aid or protection
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> To choose not to engage in any of these protected concerted activities.

WE WILL NOT engage in surveillance or create the impression of surveillance of employee union activity.

WE WILL NOT threaten employees with loss of their jobs if they do not withdraw their union authorization cards; WE WILL NOT tell employees that we will be more cooperative with respect to their future employment if they abandon their interest in union representation.

WE WILL NOT tell employees that the job will shut down if they select a union to represent them.

WE WILL NOT maintain a no-distribution/no-solicitation rule which forbids the distribution and solicitation of Section 7 protected material anywhere on our construction sites by employees during nonworktime.

WE WILL NOT isolate employees because of their union activities.

WE WILL NOT maintain any hiring policy which screens job applicants to uncover suspected union sympathizers, and WE WILL NOT refuse to consider applicants for employment based on our conclusion that they are union sympathizers.

WE WILL NOT transfer employees to other sites or discharge them because of their union membership, sympathies, or background or their activities on behalf of International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO or United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole, together with interest, those employee-applicants at Rocklin and Bakersfield for any losses they may have suffered by reason of our discriminatory refusal to consider them for hire in 1988 in the manner described in the remedy set out in the Supplemental Decision and Order, and WE WILL offer those employee-applicants at Rocklin and Bakersfield who would currently be employed but for our unlawful refusal to consider them for hire employment in the positions for which they applied or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if we had not discriminated against them.

WE WILL make whole, together with interest, employees Fred Abbott, Jim Campbell, Fenner LaCroix, Donald Cauble, Ronald Cauble, and Vern Cleveland for any losses they may have suffered by reason of the discrimination against them, and WE WILL offer the above-named employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL remove from our files any references to the discharges of Fred Abbott, Jim Campbell, Fenner LaCroix, Donald Cauble, Ronald Cauble, and Vern Cleveland and notify them in writing that this has been done and that evidence of this unlawful termination will not be used as a basis for future personnel action against them.

WE WILL notify in writing all those individuals who applied for employment at our Rocklin and Bakersfield

projects in 1988 and who were unlawfully denied employment that any future job applications will be considered in a nondiscriminatory manner.

ULTRASYSTEMS WESTERN CONSTRUCTORS, INC.